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SUNWAY UNIVERSITY COLLEGE v. MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
MARY LIM JCA
B HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: W-01(A)-210-06-2017]
15 MARCH 2019

C ***LABOUR LAW:*** *Employment – Constructive dismissal – Allegation of – Domestic inquiry found employee guilty of misconduct – Insubordination against superior – Employee downgraded from position and transferred without change in salary – Matter referred to Industrial Court – Industrial Court found employee defiant and committed acts of insubordination – Industrial Court found employer's decision to downgrade employee could not be subject of claim for constructive dismissal –* D *Whether employee constructively dismissed*

INDUSTRIAL COURT: *Award – Appeal against – Domestic inquiry found employee guilty of misconduct – Insubordination against superior – Employee downgraded from position and transferred without change in salary – Matter referred to Industrial Court – Industrial Court found employee defiant and committed acts* E *of insubordination – Industrial Court found employer's decision to downgrade employee could not be subject of claim for constructive dismissal – Industrial Court's award quashed by High Court – Whether findings of Industrial Court tainted with illegality and irrationality – Whether warranted intervention by High Court*

F The second respondent ('the claimant') was employed by the appellant ('the company') as a senior lecturer. The claimant had coordinated a project coordination meeting ('the meeting') and issued an invitation list. The claimant's immediate superior ('Dr Wong') brought in one Shanta, whose name was not on the invitation list, and this made the claimant unhappy. According to the company, the claimant left the meeting room and upon her G return, insisted that Shanta should not be present. On the other hand, the claimant argued that she did not leave the meeting room at all but only excused herself to let matters cool off after Dr Wong became agitated when the claimant queried Shanta's presence. Later, Dr Wong briefed the Vice-Chancellor of the University ('Prof Jarlath') who was of the opinion that H Dr Wong had the right to invite Shanta. The claimant insisted that Dr Wong should have informed her first. The company issued to the claimant a notice of suspension and a show cause letter, framing four allegations of misconduct against her, namely for (i) disrespecting Dr Wong; (ii) undermining Dr Wong's authority by disrupting the meeting; (iii) walking out of the I meeting without Dr Wong's approval; and (iv) disrespecting Prof Jarlath by defying his authority. A domestic inquiry subsequently conducted found the claimant guilty of the four charges. Following the decision of the domestic inquiry, the claimant was downgraded from her current position, as a

program coordinator, to a senior lecturer and was transferred from the administration to the academic section of the company. However, her salary remained unchanged. The claimant's appeal against the downgrading and transfer was rejected by the company. This prompted the claimant to walk out of the company and the matter was referred to the Industrial Court. At the Industrial Court, the claimant relied on her terms of reference ('TOR') to justify her conduct at the meeting. The hearing of the claimant's misconduct was heard *de novo* by the Industrial Court; the Industrial Court was not looking at the domestic inquiry but at the evidence of witnesses. The Industrial Court found, *inter alia*, that (i) the evidence of the witnesses for the company was more credible than the evidence of the claimant on the events that occurred during the meeting; and (ii) there was overwhelming evidence that the claimant was defiant and had committed acts of insubordination against Dr Wong. Dismissing the claimant's claim, the Industrial Court held that the company's decision to downgrade the claimant, following the finding of guilt on four charges of misconduct, could not be the subject of a claim for constructive dismissal. The claimant commenced judicial review proceedings, at the High Court, to challenge the award of the Industrial Court. The High Court Judge ('HCJ') accepted the claimant's argument on the TOR, allowed her application for judicial review and quashed the award of the Industrial Court. The matter was remitted to the Industrial Court for the determination of reliefs. Hence, the present appeal.

Held (allowing appeal)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) Where the Industrial Court was entitled to make findings of facts based on the evidence before it, the High Court should not interfere with the findings merely because it may come to a different conclusion on the facts based on the same evidence. A reviewing judge should exercise restraint and should not disturb such finding unless it could be shown that the finding was based on grounds of illegality or plain irrationality. The claimant had not shown how the findings of the Industrial Court were based on grounds of illegality. Neither had it been shown that the award was plainly irrational. In fact, the statement filed by the claimant did not specifically plead the two limited grounds of illegality and plain irrationality to allow the High Court to review the decision of the Industrial Court. (paras 29, 31 & 33)

(2) There was proper examination of the evidence and appreciation of the facts and law by the Industrial Court. The findings of the Industrial Court were arrived at based on the evidence and credibility of witnesses. Any reasonable tribunal similarly circumstanced would have arrived at the same conclusion that the claimant failed to prove her case of constructive dismissal. There was no illegality in the findings of the Industrial Court nor could the findings be said to be plainly irrational in the circumstances of the case. As such, there was no basis for the HCJ

to review the decision of the Industrial Court. The order of the High Court was set aside and the award of the Industrial Court was reinstated. (paras 41 & 42)

(3) There was nothing unlawful or unreasonable about the order or decision of Dr Wong for Shanta to remain in the meeting and there was overwhelming evidence that the claimant failed to follow Dr Wong's decision that Shanta was to remain in the meeting. Evidence also showed that the claimant (i) packed her things and walked out of the meeting abruptly without obtaining the permission of Dr Wong, as opposed to merely excusing herself from the meeting to cool off; and (ii) was defiant and insubordinated against Prof Jarlath. The Industrial Court had evaluated the evidence and there was no basis for the HCJ to disturb the findings of fact made by the Industrial Court. (para 37)

(4) The Industrial Court had come to the correct conclusion that the TOR was raised by the claimant as an afterthought. The HCJ erred in accepting the claimant's position that she had relied on the TOR to justify her behavior at the meeting, more so when there was nothing mentioned in the TOR that the claimant had the power to decide who should attend the meeting. (para 39)

Bahasa Malaysia *Headnotes*

Responden kedua ('pihak menuntut') berkhidmat untuk perayu ('syarikat') sebagai pensyarah kanan. Pihak menuntut telah menyelaraskan satu mesyuarat penyelarasan projek ('mesyuarat') dan mengeluarkan senarai jemputan. Ketua terdekat pihak menuntut ('Dr Wong') menyertakan seorang bernama Shanta, yang namanya tidak tersenarai dalam senarai jemputan, dan ini membuat pihak menuntut tidak puas hati. Menurut syarikat, pihak menuntut meninggalkan bilik mesyuarat dan sekembalinya, berkeras bahawa Shanta tidak sepatutnya hadir. Sebaliknya, pihak menuntut mengatakan dia tidak meninggalkan bilik mesyuarat tetapi hanya meminta diri keluar demi menjernihkan keadaan selepas Dr Wong menjadi marah apabila pihak menuntut mempersoalkan kehadiran Shanta. Kemudian, Dr Wong memaklumkan Timbalan Canselor Universiti ('Prof Jarlath') yang berpendapat Dr Wong berhak mengundang Shanta. Pihak menuntut menegaskan Dr Wong seharusnya terlebih dahulu memaklumkannya. Syarikat mengeluarkan notis penggantungan dan surat tunjuk sebab kepada pihak menuntut, merangka empat tuduhan salah laku terhadapnya, iaitu (i) tidak menghormati Dr Wong; (ii) menggugat kuasa Dr Wong dengan menggendalakan mesyuarat tersebut; (iii) keluar meninggalkan mesyuarat tanpa kebenaran Dr Wong; dan (iv) tidak menghormati Prof Jarlath dengan mencabar kuasa beliau. Satu inkuiri domestik dalaman, yang seterusnya dijalankan, mendapati pihak menuntut bersalah atas empat pertuduhan tersebut. Berikutan keputusan inkuiri dalaman, pihak menuntut diturunkan pangkat, sebagai penyelaras program, menjadi pensyarah kanan dan dipindahkan dari jabatan pentadbiran ke jabatan akademik syarikat. Walau

bagaimanapun, gajinya kekal tidak berubah. Rayuan pihak menuntut terhadap penurunan pangkat dan perpindahannya ditolak oleh syarikat. Ini mendorong pihak menuntut meninggalkan syarikat dan hal perkara tersebut dirujuk pada Mahkamah Perusahaan. Di Mahkamah Perusahaan, pihak menuntut merujuk bidang tugasnya ('TOR') untuk menjelaskan perilakunya semasa mesyuarat tersebut. Perbicaraan salah laku pihak menuntut didengar *de novo* oleh Mahkamah Perusahaan; Mahkamah Perusahaan tidak melihat pada inkuiri dalaman tetapi pada keterangan saksi-saksi. Mahkamah Perusahaan mendapati, antara lain, (i) keterangan saksi-saksi syarikat, tentang rentetan peristiwa yang berlaku semasa mesyuarat, lebih boleh dipercayai berbanding keterangan pihak menuntut; dan (ii) terdapat banyak keterangan bahawa pihak menuntut ingkar dan melakukan pelbagai tindakan ingkar terhadap Dr Wong. Menolak tuntutan pihak menuntut, Mahkamah Perusahaan memutuskan keputusan syarikat menurunkan pangkat pihak menuntut, berikutan dapatan salah atas empat tuduhan salah laku, tidak boleh membentuk hal perkara untuk pemecatan konstruktif. Pihak menuntut memulakan prosiding semakan kehakiman, di Mahkamah Tinggi, mencabar award Mahkamah Perusahaan. Hakim Mahkamah Tinggi ('HMT') menerima hujahan pihak menuntut tentang TOR, membenarkan permohonannya untuk semakan kehakiman pihak dan membatalkan award Mahkamah Perusahaan. Hal perkara tersebut dikembalikan kepada Mahkamah Perusahaan untuk pemutusan tentang relief-relief. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Perusahaan berhak membuat dapatan-dapatan fakta berdasarkan keterangan yang dikemukakan kepadanya. Mahkamah Tinggi tidak sepatutnya campur tangan hanya kerana Mahkamah Tinggi mungkin mempunyai kesimpulan berbeza tentang fakta berdasarkan keterangan yang sama. Hakim yang menyemak harus menahan daripada, dan tidak mengganggu, dapatan sedemikian kecuali jika terbukti bahawa dapatan tersebut dicapai berdasarkan ketaksahan atau ketakrasionalan nyata. Pihak menuntut tidak menunjukkan bagaimana dapatan-dapatan Mahkamah Perusahaan dicapai berdasarkan ketaksahan. Tidak juga ditunjukkan bahawa award tersebut nyata tidak rasional. Malah, penyata yang difailkan oleh pihak menuntut tidak memplidkan dengan khusus dua alasan terhad ketaksahan dan ketakrasionalan nyata untuk membenarkan Mahkamah Tinggi menyemak keputusan Mahkamah Perusahaan.

(2) Terdapat pemeriksaan wajar oleh Mahkamah Perusahaan akan keterangan dan pertimbangan fakta serta undang-undang. Dapatan-dapatan Mahkamah Perusahaan dicapai berdasarkan keterangan dan kebolehpercayaan saksi-saksi. Mana-mana tribunal munasabah yang berdepan dengan hal keadaan serupa akan mencapai kesimpulan sama bahawa pihak menuntut gagal membuktikan kesnya tentang pemecatan

konstruktif. Tiada ketaksahan dalam dapatan-dapatan Mahkamah Perusahaan dan, berdasarkan hal-hal keadaan kes, dapatan-dapatan ini tidak boleh dikatakan nyata tidak rasional. Oleh itu, tiada alasan buat HMT menyemak keputusan Mahkamah Perusahaan. Perintah Mahkamah Tinggi diketepikan dan award Mahkamah Perusahaan dihidupkan.

(3) Tiada apa-apa yang tidak sah atau tidak munasabah tentang perintah atau keputusan Dr Wong agar Shanta kekal menyertai mesyuarat dan terdapat banyak keterangan bahawa pihak menuntut gagal mematuhi keputusan Dr Wong agar Shanta kekal menyertai mesyuarat tersebut. Keterangan menunjukkan pihak menuntut (i) mengemas barang-barangnya dan tiba-tiba keluar meninggalkan mesyuarat tanpa kebenaran Dr Wong, dan bukan sekadar meminta diri keluar mesyuarat untuk bertenang; dan (ii) ingkar dan melakukan keingkaran terhadap Prof Jarlath. Mahkamah Perusahaan telah menilai keterangan dan tiada alasan buat HMT mengganggu dapatan-dapatan fakta yang dibuat oleh Mahkamah Perusahaan.

(4) Mahkamah Perusahaan mencapai kesimpulan betul bahawa TOR yang dibangkitkan oleh pihak menuntut adalah satu fikiran kemudian. Hakim Mahkamah Tinggi terkhilaf dalam menerima hujahan pihak menuntut bahawa dia merujuk pada TOR untuk mewajarkan perilakunya semasa mesyuarat tersebut, khususnya apabila TOR tidak menyebut apa-apa bahawa pihak menuntut mempunyai kuasa memutuskan siapa-siapa yang patut menghadiri mesyuarat tersebut.

Case(s) referred to:

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 3 CLJ 837 FC ***(refd)***

Ong See Teong & Anor v. Tenaga Nasional Bhd [2007] 1 LNS 661 HC ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(dist)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 53 r. 3(2)

For the appellant - Steve Thiru, Vilasini Menon & David Mathew; M/s Vilasini Menon
For the respondent - Remi Pereira & Diana Dawson; M/s Remi & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: 25-237-08-2015 (overruled).]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Introduction

[1] This was an appeal by Sunway University College ("the company") against the decision of the High Court in allowing the respondent's ("the claimant") judicial review application to quash the decision of the Industrial Court and in remitting the matter to the Industrial Court to decide on the appropriate reliefs.

[2] For the reasons that follow, we had unanimously allowed the appeal.

Background Facts

[3] The claimant was employed by the company as a lecturer on 1 June 1995. On 1 July 2001, the claimant was promoted to the post of a senior lecturer.

[4] The claimant alleged that she was constructively dismissed by the company on 19 December 2007, following the company's decision to downgrade her after she was found guilty of acts of defiance and insubordination towards her immediate superior, the Acting Head of the School of Computer Technology, Dr Wong Heng Hun ("Dr Wong") and the Vice-Chancellor of the University, Prof Jarlath Ronayne ("Prof Jarlath").

[5] The sequence of events that led to the disciplinary action against the claimant, briefly are as follows.

[6] A project coordination meeting ("PC meeting"), was held on 10 September 2007 at 1.30pm in the meeting room of the School of Computer Technology ("the SCT"). The claimant, as the coordinator of programme of the SCT, had issued the invitation list and agenda about a week prior to the PC meeting.

[7] The attendees at the PC meeting were Dr Wong (the Chairman), Mr Johnny, Ms Jaya Athinarayanan, Ms Shanta, Ms Nagini (the secretary) and the claimant. Shanta's name was not on the invitation list. She was brought in by Dr Wong.

[8] The claimant had asked Dr Wong as to the reason why Shanta was present at the meeting. Dr Wong explained that he had brought Shanta along to ensure continuity so that Shanta as Head of Operations could follow through on issues raised at the PC meeting during his absence. The claimant was unhappy with the explanation and stated that Shanta should not be present at the PC meeting and that Dr Wong should have consulted the claimant before he made the decision to invite Shanta to the PC meeting.

[9] Parties were at variance as to what exactly happened thereafter. The company's version was that the claimant left the meeting room and after she returned, she insisted that Shanta should not be present. The claimant on the

other hand maintained that she did not leave the meeting room at all but had only excused herself to let matters 'cool off for a while' after Dr Wong became agitated when the claimant queried the presence of Shanta.

[10] Dr Wong and Shanta then left the meeting room. Dr Wong briefed Prof Jarlath on the incident and they both returned to the meeting where Prof Jarlath asked the claimant as to her authority to question Dr Wong on Shanta's presence. Prof Jarlath had also informed the claimant that Dr Wong, as the Acting Head of the SCT had the right to invite Shanta. It was again the company's version that despite the explanation from Prof Jarlath, the claimant insisted that Dr Wong should have informed her first.

[11] On 11 September 2007, the company issued a notice of suspension to the claimant with full pay. On 21 September 2007, the company issued a show cause letter to the claimant with four allegations of misconduct. The claimant replied to the company's letter on 24 September 2007, denying all the allegations of misconduct framed against her.

[12] On 10 October 2007, a domestic inquiry was conducted where the claimant was found guilty of the following four charges:

(i) that you had shown disrespect towards your immediate superior, Dr Wong Heng Hun (Dr Wong) in the project coordination meeting held on 10 September 2007, at 1.30pm at the School of Computer Technology's meeting room by insisting that Ms Shanta leave the meeting, even though Dr. Wong had informed you that he had invited Ms Shanta to be present for the meeting. Your act of not following Dr Wong's specific instructions tantamount to an act of defiance and insubordination towards your immediate superior;

(ii) that in the project coordination meeting held on 10 September 2007, at 1.30pm at the School of Computer Technology's meeting room, you had undermined the authority of Dr Wong Heng Hun (Dr Wong) as the Acting Head of School of Computer Technology by disrupting the meeting despite the fact that Dr Wong informed you that he had the right to bring whoever he wishes for the meeting. Your act tantamount to defiance and insubordination towards your immediate superior;

(iii) that in the project coordination meeting held on 10 September 2007, at 1.30pm at the School of Computer Technology's meeting room, you had walked out the meeting room without the approval of Dr Wong Heng Hum (Dr Wong) thus showing total disrespect to Dr Wong, which tantamount to an act of defiance and insubordination towards your immediate superior;

(iv) that you had shown disrespect towards the vice-chancellor, Prof Jarlath Ronayne in the project coordination meeting held on 10 September 2007 at about 1.45pm at the school of computer technology's meeting room by defying his authority, even though you were informed by Prof Jarlath that Dr Wong Heng Hun had the right to invite whoever he wishes for the meeting. You still

> insisted that Ms Shanta should leave the meeting, which had disrupted the meeting. Your act tantamount to total defiance and insubordination towards your [*sic*] which resulted in the meeting finally being adjourned.

[13] Following the decision of the domestic inquiry, the claimant was downgraded from her current position as coordinator programme to senior lecturer and was transferred from the administration to the academic section of the company. Her salary however remained unchanged. The claimant's appeal against the downgrading and transfer was rejected by the company. Following the rejection, the claimant wrote to the company to reinstate her to her former rank and position, failing which she would claim constructive dismissal. On 17 December 2007, the claimant pleaded constructive dismissal. She walked out of the company on 19 December 2007.

[14] Pursuant to the ministerial reference, the matter was referred to the Industrial Court. The case in the Industrial Court turned on whether the company's decision to downgrade the claimant, as a form of punishment arising out of the disciplinary proceedings, could be relied upon by the claimant to claim constructive dismissal. For the record, the hearing on the misconduct of the claimant was heard *de novo* by the Industrial Court, which means that the Industrial Court was not looking at the domestic inquiry but at the evidence adduced by the witnesses before it.

[15] Having heard the evidence from among others, the persons who were present at the PC meeting and the contemporaneous documents, the Industrial Court made findings of fact that the charges of insubordination against the claimant were borne out.

[16] The Industrial Court found *inter alia* that the evidence of the witnesses for the company was more credible than the evidence of the claimant on the events that occurred during the PC meeting and that there was overwhelming evidence that the claimant was defiant and had committed the acts of insubordination against Dr Wong, her immediate superior when she failed to follow his decision that Shanta was to remain in the meeting and to accept Dr Wong's reasons for Shanta's presence.

[17] The Industrial Court held that the decision to downgrade the claimant pursuant to the finding of guilt on the four charges of misconduct could not be the subject of a claim for constructive dismissal. The claimant's claim was accordingly dismissed.

[18] The claimant took out a judicial review proceedings to challenge the award of the Industrial Court. The High Court allowed the claimant's judicial review application. The learned judge found that the claimant had proved her claim for constructive dismissal. The award of the Industrial Court was quashed and the matter remitted to the Industrial Court for the determination of the reliefs.

[19] In so deciding, the High Court reviewed the evidence of the witnesses and reversed the findings of fact made by the Industrial Court. The learned High Court Judge held that the Industrial Court committed an error of law when it concluded that there was clear evidence that the claimant had committed the four acts of misconduct of defiance and insubordination as per the charges. Among others, the learned judge accepted the position taken by the claimant that she had relied on the terms of reference ("TOR") to justify her conduct at the PC meeting. On the key issue of whether the claimant's conduct amounted to insubordination, the learned judge made the following findings:

(i) that the law on insubordination does not apply to the context and circumstances of the PC meeting;

(ii) that there was no reasonable and lawful command given by Dr Wong to the applicant at the PC meeting;

(iii) that the applicant had merely posed two "clarification questions" on the presence of Shanta;

(iv) that the Industrial Court disregarded the evidence of the claimant and her two witnesses (CLW1 and CLW3);

(v) that there was sufficient evidence that the claimant did not walk out of the meeting;

(vi) that there was no insubordination insofar as Prof. Jarlath was concerned as there was no meeting in progress at that point; and

(vii) that the punishment imposed on the claimant was disproportionate.

[20] Aggrieved by the decision of the High Court, the company appealed to this court.

The Appeal

[21] Before us, learned counsel for the company canvassed the following issues:

(i) that the High Court exercised appellate jurisdiction and had used the judicial review action as a disguised appeal;

(ii) that in coming to its conclusion that there was no insubordination, the High Court failed to consider and apply the principles set out by the Federal Court in *Ngeow Voon Yean v. Sungei Wang Plaza* [2006] 3 CLJ 837;

(iii) that there was nothing in the TOR that gave the claimant the power to decide or determine who can attend a PC meeting; and

(iv) given that insubordination can warrant dismissal from service, the company's option to downgrade the claimant cannot amount to a constructive dismissal.

[22] In respect of the first issue, it was submitted by learned counsel for the company that the High Court in its supervisory judicial review jurisdiction cannot hear a dispute decided by the Industrial Court '*de novo*' and cannot determine the merits of the dispute unless the findings of the Industrial Court were completely unsupported by any evidence or the Industrial Court had arrived at a conclusion which on the evidence it could not reasonably have arrived at.

[23] On the second issue, learned counsel for the company submitted that the principles in *Ngeow Voon Yean* (*supra*) case are applicable to the facts of the instant case and that on this ground, it was sufficient to uphold the findings of the Industrial Court.

[24] As regards the issue of the TOR, learned counsel argued that it was really a red herring and a blatant attempt by the claimant to justify her otherwise unacceptable behaviour at the meeting. Apart from the fact that there was absent in the TOR on the claimant's power to decide on the attendees of the meeting, it was highlighted that there was no evidence led that the TOR had been approved by the board of the company.

[25] On the downgrading, it was submitted for the company that the learned judge erred in concluding that the punishment imposed by the company against the claimant was disproportionate to the misconduct committed as Her Ladyship failed to consider the evidence that the downgrade was technically not in reality a downgrade but a re-designation of the claimant to her previous academic role.

[26] For the claimant, learned counsel submitted that the learned judge was absolutely correct in her finding that there was no insubordination on the part of the claimant and that the High Court was competent to disagree with the conclusions or inferences drawn by the Industrial Court on the ground that no reasonable tribunal similarly circumstanced would have arrived at such conclusions or drawn such inferences.

[27] It was further submitted for the claimant that in the context of the PC meeting, it was not a situation for the application of a strict superior-subordinate doctrine and that the learned judge was correct in her findings that the Industrial Court committed an error of law when the learned Chairman disregarded the evidence on the use of the TOR.

[28] Learned counsel had also argued that the learned judge came to the correct conclusion that the claimant had proved her claim for constructive dismissal.

Our Findings

[29] It is an established principle of law that where the Industrial Court was entitled to make findings of fact based on the evidence before it, the High Court should not interfere with the findings merely because it may come to a different conclusion on the facts based on the same evidence (see *Harpers*

A *Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417; *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627; [1995] 2 MLJ 442).

[30] In *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, the Federal Court in a majority decision held *inter alia* that in judicial
B review proceedings, the courts have the powers to review the decision of a tribunal on the merits; to substitute a different decision in place of the tribunal's decision without remitting it to the tribunal for re-adjudication; and to order consequential relief. This majority judgment has been affirmed by the Federal Court in *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh*
C [1997] 2 CLJ 11 and *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625.

[31] However, as observed by the Federal Court in *Nik Ramli* (*supra*), not every case is amenable to the *Rama Chandran* approach. It depends on the factual matrix of the case and it certainly is a matter of judicial discretion of
D the reviewing judge. The Federal Court in *Nik Ramli* (*supra*), had also stated that although a reviewing judge might not have come to the same conclusion from the established facts, the judge should exercise restraint and should not disturb such finding unless it could be shown that the finding was based on grounds of illegality or plain irrationality.

E **[32]** In *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 5 MLRA 696, the Federal Court had reiterated the principle that the findings of facts of the Industrial Court based on the credibility of witnesses ought not to be disturbed by the reviewing judge unless they were grounded on illegality or plain irrationality.

F **[33]** In the instant case, the claimant has not shown how the findings of the Industrial Court were based on grounds of illegality. Neither has it been shown that the award was plainly irrational. In fact, the statement filed by the claimant pursuant to O. 53 r. 3(2) of the Rules of Court 2012 did not
G specifically plead the two limited grounds of illegality and plain irrationality to allow the High Court to review the decision of the Industrial Court on the merits. The claimant had only made the following general averments:

> 4.1 Pemohon mengatakan bahawa Mahkamah telah terkhilaf di sisi undang-undang dan/atau fakta dan/atau bertindak melebihi/tanpa
H bidang kuasa apabila Responden Pertama berpendapat bahawa penurunan gred Pemohon daripada pangkat korporat dan gred, 'Head of Centre for Partnership and Colloboration (EG 4) kepada 'senior lecturer' gred EO dan pemindahannya daripada Bahagian Pentadbiran kepada bahagian Akademik serta perubahan dalam terma dan faedah oleh syarikat bukanlah suatu pelanggaran terma asas kontrak pekerjaannya.
>
> I (i) Responden Pertama (*sic*) telah membuat keputusan buruk dan salah dan tanpa justifikasi munasabah dimana tiada orang munasabah atau tribunal yang munasabah dalam keadaan yang sama boleh memutuskan begitu.

[34] It is a cardinal requirement that the claimant must set out her grounds clearly in the statement supported by sufficient details and comprehensive particulars of the facts and matters which the claimant sought to rely on (see *Ong See Teong & Anor v. Tenaga Nasional Bhd* [2007] 1 LNS 661; [2008] 5 MLJ 717). The above general averments were not supported by any particulars and thus were insufficient to warrant a review on the merits by the High Court.

[35] The key issue that was decided by the Industrial Court was whether the claimant's repeated questions to Dr Wong in the context of the PC meeting amounted to insubordination. In reversing the findings of the Industrial Court, the learned judge set out the reasons why she found that there was no insubordination. In this regard, we found that the High Court failed to consider the evidence on the issue that was accepted by the Industrial Court.

[36] More importantly, as submitted for the company, the High Court failed to apply the principles set out by the Federal Court in the case of *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 3 CLJ 837 where Siti Norma Yaacob FCJ (as she then was) said:

> [28] In Malaysia, the general rule governing the doctrine of superior orders is nothing more than the duty of obedience that is expected of an employee. The most fundamental implied duty of an employee is to obey his employer's orders.
>
> ...
>
> [29]... However the employee's duty to comply is confined to all the lawful and reasonable orders of his employer in respect of the performance of such functions that falls within the scope of his contract of employment. Whether the employer's orders are lawful and reasonable would depend very much on the terms and conditions of the contract and the character of employment ....
>
> ...
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> ...
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> [35] However it may well be that an employee is caught in the situation that he is required to obey an order and he is doubtful whether the order is legal or not. Under those circumstances the proper course is for the employee to obey the order first and to challenge its legality in separate proceedings. This distinction is made on the basis that if the law allows the employee to disobey any order he thinks is not legal, it would be impossible for the management to maintain discipline and industrial peace. On the other hand, if the employee takes it upon himself to disobey the order which he thinks to be unlawful and unreasonable two courses are open to him. He can point out his difficulties, if any, to the

A superior and if the latter insists on the order being carried out, he can do the work and take the matter further in proceedings against his employer or to complain to his union. If he disobeys, he must take the risk if the court finds the order to be lawful and reasonable. See the case of *Pan Global Textiles Berhad, Pulau Pinang v. Ang Beng Teik* [2002] 2 MLJ 27.

B **[37]** There was nothing unlawful or unreasonable about the order or decision of Dr Wong for Shanta to remain in the meeting and there was in fact overwhelming evidence from COW2, COW5 and COW6 that the claimant failed to follow Dr Wong's decision that Shanta was to remain in the meeting. Evidence was also led by COW5 and COW6 that the claimant C had packed her things and walked out of the meeting abruptly without obtaining the permission of Dr Wong, as opposed to merely excusing herself from the meeting to cool off. Further, COW5 and COW6 had testified that the claimant was defiant and insubordinate against Prof Jarlath. The Industrial Court had evaluated the evidence and there was no basis for the learned High Court Judge to disturb the findings of fact made by the D Industrial Court that the claimant was defiant and had committed the act of insubordination against Dr Wong and Prof Jarlath.

[38] As for the learned judge's acceptance of the TOR, it was her finding that the TOR was a crucial piece of document which was central to the whole E case. This aspect of the claimant's case was addressed by the learned Chairman wherein he made the following findings:

(i) that all the witnesses for the company testified that they have not seen the TOR;

F (ii) that in the claimant's pleadings, the TOR was referred to as a "terms of reference for the conduct of the school's day to day operations";

(iii) that the TOR was not dated and had obvious grammatical and spelling errors;

(iv) that the approval and adoption of the TOR was not mentioned at all in G any of the sets of minutes contrary to the contentions of the claimant;

(v) that the claimant had not raised the TOR during the PC meeting and neither had the claimant mentioned the TOR in her reply to the company's show cause letter; and

H (vi) that there was no evidence to show that the claimant had informed Dr Wong that he must follow the TOR and that the claimant had the right under the TOR to insist that Shanta should not be present.

[39] Given the findings of the Industrial Court as narrated above, we were of the view that the Industrial Court had come to the correct conclusion that I the TOR was clearly raised by the claimant as an afterthought. The learned judge therefore erred in accepting the claimant's position that she had relied on the TOR to justify her behaviour at the PC meeting, more so when there was nothing mentioned in the TOR that the claimant had the power to decide on who should attend the PC meeting.

[40] On the final issue of downgrading, the learned judge found that the punishment imposed by the company against the claimant was disproportionate and had reviewed the following findings of the Industrial Court:

> [71] Although the serious misconduct of insubordination warranted a dismissal, the Claimant was accorded a lesser punishment of demotion which had not entailed any reduction in her salary and benefits. The Court is of the view that the Claimant had failed to prove that the said punishment imposed on her was unwarranted or that there was bias or prejudice on the Company's part. The punishment of demotion had been done fairly following a Domestic Inquiry. The Company's action was reasonable and justified and the Claimant should have abided by the punishment imposed.
>
> [72] The Court is of the considered view that a demotion pursuant to a finding of guilt by the Domestic Inquiry could not render the Company guilty of a breach going to the root of the employment contract. The Claimant had failed to prove that the Company had breached any fundamental, express or implied term of the contract of employment or that the Company had evinced any intention of no longer to be bound by the terms of the contract.
>
> [73] The punishment to downgrade the Claimant pursuant to a finding of guilt of four charges of misconduct was a form of disciplinary action open to the Company under its inherent right to impose the appropriate punishment. Thus the Company decision to demote the Claimant in this case could not be the subject of a claim for constructive dismissal.

Conclusion

[41] Our perusal of the award showed that there was proper examination of the evidence and appreciation of the facts and law by the Industrial Court. The findings of the Industrial Court were arrived at based on the evidence and the credibility of witnesses. Any reasonable tribunal similarly circumstanced would have arrived at the same conclusion that the claimant had failed to prove her case of constructive dismissal. There was no illegality in the findings of the Industrial Court, nor can the findings be said to be plainly irrational in the circumstances of the case. As such, there was no basis for the learned judge to review the decision of the Industrial Court. The factual matrix of this case did not warrant the exercise of discretion of the learned judge to intervene and to apply the *Rama Chandran* approach.

[42] In light of all the above, we had unanimously allowed the company's appeal. We set aside the order of the High Court and reinstated the award of the Industrial Court. We made no order as to costs.